Supreme Court, U.S.
FILED
NOV 6 1995
CLERK

(2)

No. 95-570

In The

Supreme Court of the United States

October Term, 1995

AFRICAN ENTERPRISE, INC., BETHANY EVANGELICAL FREE CHURCH, HEART CRY INTERNATIONAL, INC., HINDUSTAN BIBLE INSTITUTE, INTERNATIONAL STUDENTS, INC., PROCLAMATION INTERNATIONAL AND WORLD VISION, INC.,

Petitioners,

vs.

STEVEN S. SCHOLES, as Receiver for Michael S. Douglas, D&S Trading Group, Ltd., Analytic Trading Systems, Inc., and Analytic Trading Service, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ALAN S. RUTKOFF
Counsel of Record
RICHARD L. SANDLER
MCDERMOTT, WILL & EMERY
Attorneys for Respondent
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

BEST AVAILABLE COPY

7718
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the Seventh Circuit's decision that a repealed state fraudulent conveyance statute can be used to void gifts to charities of funds misappropriated in a securities fraud, where no federal issue is involved and where no case law or legislative history supports Petitioners' policy-based argument that the repealed state statute — by its terms applicable to "*every*" gift — should be interpreted to create an exception for gifts made to charities.

2. Whether this Court should review the Seventh Circuit's decision that, under *McCandless v. Furlaud*, 296 U.S. 140 (1935), and other decisions of this Court, an equity receiver appointed to represent entities used to perpetrate a securities fraud and the person who orchestrated the scheme is permitted to bring claims to recover fraudulent conveyances made by the entities, where the recovery will benefit all of the entities' constituents but not the person who committed the fraud.

3. Whether this Court should consider Petitioners' constitutional defenses where those defenses were not raised in the pleadings or otherwise presented in the district court, were not considered by the Seventh Circuit and involve issues of fact on which the parties never had the opportunity to present any evidence.

LIST OF PARTIES

The proceeding in the United States Court of Appeals for the Seventh Circuit, whose decision is sought to be reviewed, consisted of four consolidated appeals: Nos. 94-2718, 94-2947, 94-2039 and 94-2136.

The following persons and entities are now before the Court and were parties to the proceedings indicated:

Petitioners: African Enterprise, Inc., Bethany Evangelical Free Church, Hindustan Bible Institute, International Students, Inc., Proclamation International and World Vision, Inc. (No. 94-2718); Heart Cry International, Inc. (No. 94-2947).

Respondent: Steven S. Scholes, as Receiver for Michael S. Douglas, D&S Trading Group, Ltd., Analytic Trading Systems, Inc., and Analytic Trading Service, Inc.[1] (Nos. 94-2718, 94-2947, 94-2039 and 94-2136).

The following persons were parties to the proceedings indicated and have no interest in the outcome of the proceedings in this Court:

Charles Lehmann and Lisa Lehmann (No. 94-2039); Joseph E. Phillips (No. 94-2136).

---

1. Analytic Trading Systems, Inc., and Analytic Trading Service, Inc., for which Respondent is receiver, have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of the Supreme Court.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Counterstatement of the Case	2
Summary of Reasons for Denying the Writ	4
Reasons for Denying the Writ	5
I. This Court should not consider whether a policy-based exception should be engrafted into a clear and unambiguous state statute.	5
II. The determination that Respondent has standing to sue Petitioners under the now-repealed Illinois fraudulent conveyance statute is consistent with, and is supported by, prior decisions of this Court.	8
III. The Seventh Circuit properly declined to consider the constitutional arguments raised for the first time on appeal by Petitioner International Students, Inc.	11
Conclusion	16

Page

TABLE OF CITATIONS

Cases Cited:

Braxton v. United States, 500 U.S. 344 (1991) 6

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972) 4, 8, 10, 11

Casey v. Cavaroc, 96 U.S. 467 (1878) 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Chicago v. Michigan Beach Hous. Coop., 242 Ill. App. 3d 636, 609 N.E. 2d 877 (1st Dist. 1993) 6

Consumers Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 7

Continental Airlines v. Intra Brokers, 24 F.3d 1099 (9th Cir. 1994) 14

Cooper v. Lane, 969 F.2d 368 (7th Cir. 1992) 12

Crooks v. Harrelson, 282 U.S. 55 (1930) 4, 8

Deitrick v. Greaney, 309 U.S. 190 (1940) 10

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 7

Citations

Page

Hernandez v. Commissioner, 490 U.S. 680, *reh'g denied*, 492 U.S. 933 (1989) 5, 13, 15

Hormel v. Helvering, 312 U.S. 552 (1941) 13, 15

Indiana Nat'l Bank v. Gamble, 612 F. Supp. 1272 (N.D. Ill. 1984) 7

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) 14

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 13, 15

McCandless v. Furlund, 296 U.S. 140 (1935) ..... i, 4, 9, 10, 11

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 6

Roth v. Carlyle Real Estate Ltd., Partnership VII, 129 Ill. App. 3d 433, 472 N.E.2d 836 (1st Dist. 1984) 10

Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied sub nom Arthur Andersen & Co. v. Schacht*, 464 U.S. 1002 (1983) 10

Singleton v. Wulff, 428 U.S. 106 (1976) 4, 12, 13, 15

Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc., 158 Ill. 2d 76, 630 N.E.2d 820 (1994) .. 7

Southmark Corp. v. Cagan, 999 F.2d 216 (7th Cir. 1993) . 10

Citations

	Page
Texas & Pac. Ry. Co. v. Pottorff, 291 U.S. 245 (1934)	4, 9
Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)	14
Tcherepnin v. Franz, 457 F. Supp. 832 (N.D. Ill. 1978) ...	7, 10
United States v. American Bar Endowment, 477 U.S. 105 (1986)	5
United States v. James, 478 U.S. 597 (1986)	7
Youker v. Gulley, 536 F.2d 184 (7th Cir. 1976)	12
Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990)	6
Statutes Cited:	
11 U.S.C. § 501, *et seq.* (repealed by P.L. 95-598, effective October 1, 1979)	11
11 U.S.C. § 567 (repealed 1979)	11
11 U.S.C. § 587 (repealed 1979)	11
26 U.S.C. § 170	6
Ill. Rev. Stat. ch. 59, ¶¶ 101, *et seq.* (1991) (now 740 ILCS 160/1, *et seq.*).	5
Ill. Rev. Stat. ch. 59, ¶ 4 (1989) (repealed by P.A. 86-814, § 13, effective January 1, 1990)	5, 11

Citations

Page

United States Constitution Cited:

First Amendment 3, 12, 13

Fourteenth Amendment 3, 12, 13

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 3

Supreme Court Rule 10.1 ..... 4, 6

Other Authorities Cited:

Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy,* 42 U. Chi. L. Rev. 589 (1975) 9

Note, *Power of Receiver for Corporation to Assert Causes of Action Vested Solely in Creditors,* 46 Yale L.J. 1229 (1937) 9

No. 95-570

In The

Supreme Court of the United States

October Term, 1995

AFRICAN ENTERPRISE, INC., BETHANY EVANGELICAL FREE CHURCH, HEART CRY INTERNATIONAL, INC., HINDUSTAN BIBLE INSTITUTE, INTERNATIONAL STUDENTS, INC., PROCLAMATION INTERNATIONAL AND WORLD VISION, INC.,

Petitioners,

vs.

STEVEN S. SCHOLES, as Receiver for Michael S. Douglas, D&S Trading Group, Ltd., Analytic Trading Systems, Inc., and Analytic Trading Service, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Steven S. Scholes, respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by

Petitioners African Enterprise, Inc., Bethany Evangelical Free Church, Heart Cry International, Inc., Hindustan Bible Institute, International Students, Inc., Proclamation International and World Vision, Inc.

COUNTERSTATEMENT OF THE CASE

Between August, 1987, and November 13, 1989, Michael S. Douglas ("Douglas"), a twice-convicted felon, operated a massive Ponzi scheme in which investors lost over $30 million. He induced people to purchase non-existent interests in three separate investment entities which he created to perpetuate the scheme using offering material that was materially false and misleading. He promised extraordinary returns that falsely were represented to be consistent with the entities' past performance.

During the scheme, Douglas diverted $12 million in invested funds to his own personal use. As a result of this conduct, Douglas "gained a reputation for his philanthropy." (Petition at 3). As much as $1.75 million in diverted funds were given to sixteen charitable and religious organizations, including over $500,000 given to Petitioners.

The Securities & Exchange Commission (the "SEC") instituted an enforcement action against Douglas and his entities on November 13, 1989. *See SEC v. Douglas,* No. 89 C 8407 (N.D. Ill.) (Alesia, J.). Respondent was appointed receiver for Douglas and for the investment entities that he previously dominated under the terms of a permanent injunction. He was charged with the responsibilities of marshalling the assets of Douglas and the investment entities, including the assertion of their claims against third parties.

This action was filed by Respondent on July 13, 1990. Jurisdiction of the district court was ancillary to its subject matter

jurisdiction over the SEC's enforcement action. While recovery of the diverted funds given to Petitioners[2] was sought under three alternative state-law theories — fraudulent conveyance, unjust enrichment and constructive trust — the district court reached the merits of the fraudulent conveyance claims only and entered summary judgment in favor of Respondent on those claims.[3] (App. 51a).

Petitioners appealed the judgment to the Seventh Circuit. In the Seventh Circuit, Petitioner International Students, Inc. relied mainly on defenses that the judgment below would place a substantial burden on its constitutional rights to free exercise of religion and free association under the First and Fourteenth Amendments to the United States Constitution. These constitutional issues were neither presented to nor considered by the district court. Accordingly, Petitioners did not offer any evidence at any stage of the proceedings to support their present contention that charities across the nation would experience the dire consequences they posit.

The Seventh Circuit affirmed the judgment. (App. 22a). In doing so, the court declined to consider the constitutional arguments asserted by Petitioner International Students, Inc., on the ground that they had not been raised before the district court. Petitions for Rehearing were denied by the Seventh Circuit on July 12, 1995. (App. 23a).

---

2. Nine other charity defendants either settled their claims or were defaulted in the district court.

3. Petitioners' Rule 12(b)(6) motions to dismiss the constructive trust counts for failure to state proper claims were granted by the district court. (App. 66a, 68a). Respondent moved for summary judgment on the unjust enrichment claims; however, the district court did not reach the merits of those claims. (App. 50a).

SUMMARY OF REASONS FOR DENYING THE WRIT

1. No issue of federal law is presented. *See* Supreme Court Rule 10.1. Petitioners seek to have this Court carve out an exception from a clear and unambiguous state statute. The statute expressly applies to "every gift" made with intent "to hinder or defraud creditors or other persons . . . ." Yet, Petitioners seek to exclude gifts to charity from its reach while offering no basis for departing from the letter of the statute to accomplish policies that prefer charities. *See Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The Illinois legislature, not the federal courts, should decide whether or not charitable contributions are entitled to special treatment under a state fraudulent conveyance statute.

2. The Seventh Circuit's decision that Respondent has standing to bring fraudulent conveyance claims for the benefit of the entities in receivership is consistent with prior decisions of this Court. *See, e.g., McCandless v. Furlaud*, 296 U.S. 140 (1935); *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245 (1934). No conflict exists with this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), since Respondent's recovery will benefit all constituents of the entities in receivership in accordance with their respective interests. In *Caplin*, the trustee's claims belonged to a single class of creditors. No recovery was sought for the benefit of all of the debtor's constituents.

3. The Seventh Circuit's refusal to consider the constitutional defenses raised for the first time in the appellate court was a proper exercise of its discretion. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Among other things, these defenses can be decided only on a complete factual record on the issue of whether application of the repealed Illinois fraudulent conveyance statute substantially burdened Petitioners' observance of their central religious beliefs or practices and

violated their due process and equal protection rights. No such record exists.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT CONSIDER WHETHER A POLICY-BASED EXCEPTION SHOULD BE ENGRAFTED INTO A CLEAR AND UNAMBIGUOUS STATE STATUTE.

The Illinois fraudulent conveyance statute at issue rendered void "[e]very gift" that hindered or defrauded creditors of the donor or other persons. R.S. 1874, p. 540, § 4 (codified as amended at Ill. Rev. Stat. ch. 59, ¶ 4 (1989), and repealed by P.A. 86-814, § 13, effective January 1, 1990).[4] The charitable donations received by Petitioners from Douglas fell clearly within the reach of the statute as such donations are, by definition, gifts. As this Court has stated: "The *sine qua non* of a charitable contribution is a transfer of money or property **without adequate consideration.**" *United States v. American Bar Endowment*, 477 U.S. 105, 118 (1986) (emphasis added); *see also Hernandez v. Commissioner*, 490 U.S. 680, 691, *reh'g denied*, 492 U.S. 933 (1989). Yet, Petitioners now ask this Court to reinterpret the clear and unambiguous language of this state statute to include an exception for tax deductible contributions made to charitable organizations.[5]

---

4. Respondent's claims were premised upon the Illinois Fraudulent Conveyance Act existing at the time of the transfers. The Act was repealed effective January 1, 1990, and was replaced by Ill. Rev. Stat. ch. 59, ¶¶ 101, *et seq.* (1991) (now 740 ILCS 160/1, *et seq.*).

5. Petitioners argue that the tax-deductible nature of the contributions they received supplied the necessary consideration to preclude the transfers (Cont'd)

Petitioners' request to this Court to interpret a state statute is dispositive of their Petition. A primary purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals or among state courts of last resort concerning the meaning of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991); Supreme Court Rule 10.1. The meaning of federal law is not implicated here.[6]

Moreover, this Court steadfastly has refused to rewrite unambiguous language of a statute under the guise of statutory construction. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's

---

(Cont'd)

from being fraudulent conveyances. (Petition at 13). However, tax deductions are not property rights which Petitioners are empowered to dispense in return for contributions. The Internal Revenue Code reflects a determination to allow charitable donors to reduce their tax liability by allowing a deduction in the amount of their qualifying contributions. *See* 26 U.S.C. § 170; *cf. Randall v. Loftsgaarden*, 478 U.S. 647, 656-58 (1986) (rejecting argument that tax deductions incidental to investments in a security constitute consideration received for the instrument); *Chicago v. Michigan Beach Hous. Coop.*, 242 Ill. App. 3d 636, 647, 609 N.E.2d 877, 886 (1st Dist. 1993) ("Tax credits, as *Randall* instructs us, have no independent value in and of themselves. . . .").

6. Petitioners' concerns about the applicability of the Seventh Circuit's construction of the Illinois statute to fraudulent conveyance provisions under federal bankruptcy laws are not before this Court. The only statute at issue is the now-repealed Illinois fraudulent conveyance statute. Moreover, Petitioners readily admit that no present conflict exists among the Circuits in the application of federal bankruptcy laws to charitable contributions. (Petition at 11). The only Circuit Court decision on that very issue is consistent with the Seventh Circuit's decision below. *See Zahra Spiritual Trust v. United States*, 910 F.2d 240, 248-49 (5th Cir. 1990).

meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 (1986), *quoting Consumers Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]here must be something to make plain the intent of [the legislature] that the letter of the statute is not to prevail."); *accord Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc.*, 158 Ill. 2d 76, 83, 630 N.E.2d 820, 823 (1994) ("Where an enactment is clear and unambiguous, . . . a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.").

The Illinois fraudulent conveyance statute was in effect for over 100 years. During that time, the statute remained unchanged in substance despite its use to void charitable contributions. *See, e.g., Indiana Nat'l Bank v. Gamble*, 612 F. Supp. 1272 (N.D. Ill. 1984); *Tcherepnin v. Franz*, 457 F. Supp. 832 (N.D. Ill. 1978). Against this backdrop, Petitioners have not presented (and cannot present) any authority — legislative, judicial or otherwise — to support their proposition that the Illinois legislature's plain intent was not to have the statute reach "[e]very gift," despite its language to the contrary.

Petitioners' claims about the far-reaching effects of the decision below are exaggerated and unfounded. However, even if this Court were to give credence to those claimed effects, Petitioners' desired protection from the decision below must come from the Illinois legislature, not from this Court.

> It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

Crooks v. Harrelson, 282 U.S. 55, 60 (1930). *See also Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 434 (1972).

The Seventh Circuit's decision was correct under the clear and unambiguous terms of the statute at issue.

II.

THE DETERMINATION THAT RESPONDENT HAS STANDING TO SUE PETITIONERS UNDER THE NOW-REPEALED ILLINOIS FRAUDULENT CONVEYANCE STATUTE IS CONSISTENT WITH, AND IS SUPPORTED BY, PRIOR DECISIONS OF THIS COURT.

The Seventh Circuit's analysis in finding that state law permits Respondent to recover the gifts that Douglas made to Petitioners is correct. Douglas' diversion of invested funds from the entities to Petitioners injured the entities. Respondent, as the entities' receiver, was entitled to recover these diversions without being saddled with defenses based on Douglas' misconduct. Equity has long recognized the receiver's special role in remedying transactions made in fraud of the creditors of the entities he represents, even if the entities themselves would have

been estopped to obtain the same recovery while under continued domination of the wrongdoer whose misconduct led to the receivership. *See* Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589, 609-10 (1975); Note, *Power of Receiver for Corporation to Assert Causes of Action Vested Solely in Creditors*, 46 Yale L.J. 1229, 1229-30 (1937).

This very analysis grows out of past decisions of this Court. For example, in *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245 (1934), this Court stated: "It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so." *Id.* at 261. One year later, in *McCandless v. Furlaud*, 296 U.S. 140, 159-61 (1935), the receiver of an insolvent corporation was found to have standing to recover profits diverted from the corporation by its shareholders in the sale of the corporation's assets when the diversions placed the corporation's creditors in jeopardy.

> A court of equity has taken hold of the assets of this company, intangible assets as well as tangible, for administration as a trust in accordance with equitable principles. Included in those assets are moneys fraudulently diverted to the prejudice of creditors. There is power at the instance of the receiver to bring them back into the trust.

Id. at 160-61 (citations omitted). The fact that the shareholders operated the corporation and caused the diversions posed no bar to the receiver's right to recover the promoters' illegal gain on behalf of the corporation. "It was not within the power of the

shareholders to legalize this waste to the detriment of others." *Id.* at 160.[7]

The decision below is also consistent with prior Seventh Circuit authority. For example, in *Southmark Corp. v. Cagan,* 999 F.2d 216 (7th Cir. 1993), a receiver for entities used to implement a Ponzi scheme was allowed to assert fraudulent conveyance claims for funds improperly taken from the entities. The Seventh Circuit stated: "If looting occurred, then Equity was injured, and Equity's receiver may chase [the transferee] to regain some of the misappropriated funds under *Schacht v. Brown,* 711 F.2d 1343, 1348 (7th Cir. 1983) [, *cert. denied sub nom. Arthur Andersen & Co. v. Schacht,* 464 U.S. 1002 (1983)]." *Southmark Corp.,* 999 F.2d at 223. In *Schacht,* the court found that the liquidator of an insurance company had standing to sue certain insiders for looting and other illegal activity which prolonged the company's business to the detriment of its policyholders and creditors. *Schacht,* 711 F.2d at 1346-50.[8]

Finally, Petitioners misread this Court's ruling in *Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416 (1972), in an attempt to create a conflict between the Seventh Circuit's decision and prior decisions of this Court. In *Caplin,* this Court

---

7. *See also Deitrick v. Greaney,* 309 U.S. 190 (1940) (receiver entitled to bring action on note possessed by debtor even though debtor could not have done so); *Casey v. Cavaroc,* 96 U.S. 467, 489-90 (1878) (receiver may seek to void fraudulent conveyances ". . . even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim").

8. The Seventh Circuit's decision is also consistent with reported decisions in which fraudulent conveyance actions have been brought by receivers under the Illinois statute. *See Tcherepnin v. Franz,* 457 F. Supp. 832 (N.D. Ill. 1978); *Roth v. Carlyle Real Estate Ltd. Partnership VII,* 129 Ill. App. 3d 433, 472 N.E.2d 836 (1st Dist. 1984).

held that a reorganization trustee, while having powers akin to those of a receiver, could not act solely for the benefit of a distinct group of creditors under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501, *et seq.* (repealed by P.L. 95-598, effective October 1, 1979), to the exclusion of all other creditors and others having an interest in the debtor's estate. *Caplin*, 406 U.S. at 434. In stark contrast, the Seventh Circuit correctly found that Respondent's claims belonged to the entities in receivership for the ultimate benefit of all constituents of the entities, not for any single class of creditors. Thus, Respondent is entitled to bring[9] the diverted assets back into the receivership estates. This recovery, with any others, will benefit all of the entities' creditors, including the defrauded investors. *McCandless v. Furlaud*, 296 U.S. 140, 160-61 (1935).

The Seventh Circuit's decision that Respondent had standing under the now-repealed fraudulent conveyance statute was perfectly consistent with prior decisions of this Court. No basis for review of that decision exists.

III.

THE SEVENTH CIRCUIT PROPERLY DECLINED TO CONSIDER THE CONSTITUTIONAL ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL BY PETITIONER INTERNATIONAL STUDENTS, INC.

All Petitioners advance the argument made only by Petitioner International Students, Inc. in the Seventh Circuit that

---

9. *Caplin* was based on this Court's interpretation that the Bankruptcy Act, 11 U.S.C. §§ 567 and 587 (repealed 1979), did not authorize the trustee in reorganization to proceed with the action. It specifically recognized that Congress had the power to confer that power. *Caplin*, 406 U.S. at 422, 434. On the other hand, the Illinois fraudulent conveyance statute conferred that power upon Respondent by making fraudulent transfers void as against "other persons." Ill. Rev. Stat. ch. 59, ¶ 4 (repealed 1990).

application of the Illinois fraudulent conveyance law to them violates their constitutional rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States.[10] This constitutional challenge to the Receiver's claims never was raised in the district court. For this reason, it was not considered by the Seventh Circuit. (App. 16a-17a).

"The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Seventh Circuit adheres to the rule that "a litigant may not present on appeal as a ground for reversal an issue which was not presented to the trial court and which it, therefore, had no opportunity to decide." *Youker v. Gulley*, 536 F.2d 184, 186 (7th Cir. 1976); *see also Cooper v. Lane*, 969 F.2d 368, 373 (7th Cir. 1992) (failure to raise constitutional argument in opposition to summary judgment motion in district court required affirmance of judgment). As this Court has explained:

> [T]his is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could,

---

10. An open question is whether each Petitioner can argue that the judgment below impermissibly infringes upon its religious freedoms. According to Petitioners' Statement of the Case, it would appear that Proclamation International's charitable purposes are secular, not religious. (Petition at 4). Similarly, World Vision's charitable purposes appear to be secular, at least in part. (*Id.*).

> offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Singleton, 428 U.S. at 120, *quoting Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

This case presents a situation which is almost a mirror image of that presented in *Singleton*. There, this Court found that the Court of Appeals' resolution of the case on the merits was an impermissible exercise of appellate jurisdiction because the district court disposed of the case on a procedural issue. Thus, the plaintiff never had an opportunity to present any evidence on the merits. *Singleton*, 428 U.S. at 119-20. In this case, Petitioners attempt to mount a constitutional challenge on the merits for the first time before this Court. Yet, this challenge is almost exclusively dependent upon a finding that application of the Illinois fraudulent conveyance statute to charitable gifts will substantially burden Petitioners' free exercise of religion in violation of the First and Fourteenth Amendments. This requires proof of a government-imposed substantial burden that, typically, coerces a modification of religious beliefs or behavior, or that penalizes religious observance by denying adherents the rights enjoyed by others. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); *see also Hernandez v. Commissioner*, 490 U.S. 680, 698, *reh'g denied*, 492 U.S. 933 (1989).

Any finding that application of the fraudulent conveyance law to the Petitioners in this setting has or will have the constitutionally impermissible impact upon them can be based

only on evidence offered on that very proposition. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989) (exemption from state sales tax for religious periodicals not compelled by Free Exercise Clause where State adduced no evidence to prove that payment of sales tax offended or inhibited religious beliefs or activities). Thus, if the defense had been raised in the district court, Petitioners would not have avoided summary judgment without adducing facts to support the claim that application of the fraudulent conveyance statute will have the dire consequences that they predict. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (granting summary judgment where "nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."). Petitioners never took the opportunity to offer such evidence in support of their constitutional challenge. They should not be permitted to circumvent this Court's rule in *Celotex* now by making their constitutional arguments for the first time on appeal in the absence of supporting evidence. The entry of summary judgment on the record in the district court was entirely proper and correct. *See Continental Airlines v. Intra Brokers*, 24 F.3d 1099, 1103 (9th Cir. 1994) (summary judgment proper where defendant fails to produce evidence supporting elements of its affirmative defense).

Further, logic suggests that had they presented evidence below, Petitioners could not have made "a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. This Court previously has held in comparable settings that the "burdens" which Petitioners believe are imposed by the repealed statute are simply earmarks of neutral commercial regulation and, thus, are not constitutionally significant. *See Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990) (upholding imposition of retail sales taxes on religious merchandise since the tax merely

decreased the amount of money available to spend on religious activities); *Hernandez v. Commissioner*, 490 U.S. 680, 699, *reh'g denied*, 492 U.S. 933 (1989) (upholding disallowance of tax deductions for charitable contributions made in payment for spiritual training for the same reason); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (incidental effects of government programs, making it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their beliefs, do not require government to show "a compelling justification" for its actions).

The Court has recognized circumstances under which a federal appellate court is justified in reviewing an issue not passed on below, such as where "injustice might otherwise result." *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). However, this case does not present those circumstances. Here, Petitioners consciously chose not to assert and support any constitutional defenses in the summary judgment proceedings in the district court. As a result, the refusal of the Seventh Circuit to consider the constitutional arguments raised here without any evidentiary record was a proper exercise of its discretion. This Court should not now relieve Petitioners of the consequences of their actions and make constitutional law on mere supposition.

CONCLUSION

For all of these reasons, Respondent respectfully asks this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ALAN S. RUTKOFF
Counsel of Record
RICHARD L. SANDLER
MCDERMOTT, WILL & EMERY
Attorneys for Respondent
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000